

TITLE IX - JUNE 2024 OVERVIEW

SPECIAL UPDATE - TITLE IX

REPLACEMENT POLICY AND AG 2266

JUNE 2024

OVERVIEW AND COMMENTS

This Special Update is issued to Neola Clients in response to the recent release of revisions to the Title IX regulations. The new policy and administrative guideline, along with the new form, provide structure and procedure for meeting the requirements of this Federal regulation.

Nearly twenty-two (22) months after the United States Department of Education ("ED") Office for Civil Rights ("OCR") issued a Notice of Proposed Rule Making ("NPRM"), on April 19, 2024, OCR released the Final Rule (aka "2024 Title IX Regulations"). In response, Neola has developed a new Policy 2264 and a new Administrative Guideline 2264. Neola is compelled to keep its existing Title IX policy and AG (2266), which it originally drafted after OCR released the 2020 Title IX regulations in May of 2020, because OCR stated when it released the 2024 Title IX regulations that any "reports" or "Formal Complaints" involving allegations of sex-based harassment (e.g., sexual harassment) that involve conduct alleged to have occurred prior to August 1, 2024 (the effective date of the 2024 Title IX regulations) must be processed in accordance with the 2020 Title IX regulation. A new introduction regarding the effective date has been added to each. For this reason, clients will need to continue to train their staff in the requirements and procedures delineated in the 2020 Title IX regulations (Policy 2266 and AG 2266) at the same time they train their staff to implement the 2024 Title IX regulations (and new Policy 2264 and AG 2264).

It is important to notice that new Policy 2264 is broader in scope than Policy 2266. Whereas the 2020 Title IX regulations focused on sexual harassment, the 2024 Final Rule covers all forms of sex discrimination, not just "sex-based harassment" – e.g., claims of unequal athletic opportunities, admissions discrimination, discrimination in courses or academic programs (i.e., excluding students from certain classes or programs based on their sex), pregnancy discrimination, unequal treatment based on parental, family or marital status, discrimination in employment (including in hiring, promotion, and compensation), and retaliation. Also of note, the ED has yet to issue final regulations pertaining to Title IX's mandates relative to student athletic participation. Proposed regulations were issued April 13, 2023, however, final regulations are not expected until potentially after the November 2024 election.

The new policy contains updated definitions, including for complaints (which can be oral or written; previously a Formal Complaint had to be in writing), complainants (which now includes persons who participated in or attempted to participate in the District's education program or activity at the time of the alleged sex discrimination – i.e., it includes persons who previously were involved in the District's education program or activity, but no longer are), and hostile environment harassment (which now entails behaviors that are unwelcome, sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive, and is so severe OR pervasive that it limits or denies a person's ability to participate in or benefit from the District's education program or activity; previously the conduct had to be objectively offensive, severe, AND pervasive), along with new definitions related to confidential employees (be sure to review the **DRAFTING NOTE** that accompanies this term) and pregnancy or related conditions.

This last new definition is relevant because the 2024 Title IX regulations include a significant amount of content pertaining to protecting students and employees who are pregnant or have related conditions.

Also note the “reports” of sexual harassment found in the 2020 Title IX regulations are now referred to as “notifications” of alleged sex discrimination in the 2024 Final Rule.

Additionally, while the Board can continue to designate more than one (1) Title IX Coordinator, it must designate one (1) primary Title IX Coordinator who is responsible for all key decisions. This change may cause districts to develop alternative names for the persons who are designated to assist the Title IX Coordinator – e.g., the Assistant or Deputy Title IX Coordinator.

Turning to the grievance procedures, the 2024 Final Regulations provide greater flexibility to the District. For example, the Title IX Coordinator can now serve as both the investigator and decisionmaker, in appropriate circumstances. In addition, we are hopeful that districts will be able to complete the grievance procedures in less time since the two (2), ten (10) day, mandatory periods associated with (1) the parties' opportunity to review the evidence before the investigator's report is finalized, and (2) the period after the investigator's report is completed and the decisionmaker can issue a determination of responsibility, have been altered or eliminated. Further, the District can now implement an informal resolution process – with the mutual agreement of the parties – without a Formal Complaint having been filed first.

When it comes to the District's obligation to offer supportive measures to complainants and respondents, there now is a review mechanism for a person to challenge or request new or different supportive measures.

With respect to dismissal of a complaint prior to an investigation, the Title IX Coordinator still has discretion to take such an action, but it is no longer mandatory in certain circumstances. Likewise, the Title IX Coordinator can still elect to file a complaint – in place of a complainant – in specific situations, but the 2024 Final Rule outlines several factors the Title IX Coordinator needs to consider before taking such an action.

The 2024 Final Rule also expands the District's responsibility to address sex discrimination that occurs in any setting over which the District asserts disciplinary authority. As such, the Board may want to evaluate how it handles cyberbullying and whether its Athletic Code of Conduct is enforced 24/7/365. It further requires the District to address a sex-based hostile environment under its education or activity, even when some of the conduct alleged to be contributing to the hostile environment occurred outside the education program or activity, or outside the United States.

The District also will want to pay particular attention to the following sections of new Policy 2264:

- The content of the Notice/Statement of Nondiscrimination and where it needs to be published. To aid in this area, Neola is offering a new Form 2264 F1 that can be utilized to comply with the Notice/Statement of Nondiscrimination requirements of the 2024 Final Rule.
- The enhanced and expanded training requirements (training has to be completed promptly upon employment and when a person's responsibilities with respect to Title IX implementation change, and annually thereafter).

Finally, as discussed in an early **DRAFTING NOTE** in the new policy, the 2024 Title IX regulations expressly state that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. It is this language that has resulted in a significant portion of the negative reaction that has been voiced concerning the 2024 Final Rule and led to litigation related to whether OCR exceeded its authority when reading the holding from the Bostock decision – that involved Title VII – into Title IX. The Board will want to be sensitive to the language in the 2024 Final Rule that states that in the limited circumstances when Title IX permits different treatment or separation on the basis of sex, the District shall not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as otherwise permitted

under Title IX. The Title IX regulations continue by stating that adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex. This latter language has direct implications for bathroom and locker room usage.

Both new Policy 2264 and AG 2264 contain numerous **OPTIONS** and **DRAFTING NOTES** to assist the Board and the Administration with tailoring the template documents to the District's individual needs and preferences. Adopting the new documents, however, is necessary to remain consistent with the 2024 Title IX regulations, which "carry the force and effect of law" as a result of the U.S. Department of Education going through the notice and comment rulemaking process prior to promulgating them.

As always, your Neola Associate is available to answer questions concerning the content of the new policy and AG; however, given there is pending litigation pertaining to the 2024 Final Rule and many of the topics covered by the documents may be viewed as locally sensitive, Neola encourages the Board to consult with its Legal Counsel as it (1) selects among the various options, and (2) ultimately implements its Title IX nondiscrimination policy and grievance procedures.

This Update includes the following documents:

- **Policy 2264 - Nondiscrimination on the Basis of Sex in Education Programs or Activities (New)**
- **Policy 2266 - Nondiscrimination on the Basis of Sex in Education Programs or Activities (Revised)**
- **AG 2264 - Nondiscrimination on the Basis of Sex in Education Programs or Activities (New)**
- **AG 2266 - Nondiscrimination on the Basis of Sex in Education Programs or Activities (Revised)**
- **Form 2264 F1 - Notice and Statement of Nondiscrimination (New)**

These documents may be downloaded from the Local Policy Update and the Local AG Update menus in your BoardDocs console. If you have questions about any of these Special Update materials, contact your Neola Associate.

If you have questions about any of these Special Update materials, please contact your Neola Associate. All production-related materials and questions should be directed to the Production Office - Coshocton at 632 Main Street, Coshocton, Ohio 43812 (phone 800-407-5815, fax 740-622-2557). Billing and other questions should be directed to the Business Office - Stow at 3914 Clock Pointe Trail, Suite 103, Stow, Ohio 44224 (phone 330-926-0514, fax 330-926-0525).

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